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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 576

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI,
Petitioner,

vs.

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOE T. PATTERSON,
Attorney General of the State of Mississippi,

DUGAS SHANDS,
Assistant Attorney General of the State of Mississippi,

PETER M. STOCKETT, JR.,
Special Assistant Attorney General of the State of Mississippi,

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No.

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI,
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ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

I.

CITATION TO OPINION BELOW.

No opinion was rendered by the United States District Court for the Southern District of Mississippi. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 306 F.2d 222 and is set forth in Appendix "A" hereto.

II.

JURISDICTION.

The opinion and order of the United States Court of Appeals for the Fifth Circuit was entered on July 11, 1962, and the order appears in Appendix "B" hereto. A motion for rehearing filed by petitioner was denied by said Court of Appeals on August 8, 1962, and the order denying the motion for rehearing appears in Appendix "C" hereto. The jurisdiction of this court is invoked pursuant to 28 U.S.C.A., Section 1254(1).

III.

QUESTIONS PRESENTED.

1. Did said Circuit Court of Appeals err in holding that the order entered by the District Court remanding the cause to its files was an appealable order?

2. Did said Circuit Court of Appeals err in limiting the judicial inquiry of the District Court solely to the question of whether the defendant-respondent registrar had been served with a duly written record demand by said Attorney General and to the question of whether the defendant-respondent registrar had been afforded notice of the pendency of the enforcement order proceedings?

3. Did said Circuit Court of Appeals err in holding that the factual foundation for, or the sufficiency of, the Attorney General's "statement of the basis and the purpose" contained in the written demand, 42 U.S.C.A., Section 1974(b), is not open to judicial review or ascertainment.

4. Did the Circuit Court of Appeals err in holding that there existed a "case or controversy" within the meaning of Article III, Section 2, of the Constitution of the United

States, and at the same time holding that the Federal Rules of Civil Procedure were not applicable or available to petitioner.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves the following constitutional provisions and statutes of the United States, the full text of which will be set out in Appendix "D" hereto:

1. The Fourteenth Amendment to the Constitution of the United States.
2. Title III to Civil Rights Act of 1960.
3. Rule 81(a)(3), Federal Rules of Civil Procedure.
4. 28 U.S.C.A., Section 1291.
5. 28 U.S.C.A., Section 1292(1).

V.

STATEMENT OF CASE.

Honorable W. P. Rogers, as Attorney General of the United States (the Honorable Robert F. Kennedy having been substituted for the original plaintiff after he became Attorney General of the United States), filed complaint on January 19, 1961, for relief under Title III of the Civil Rights Act of 1960, being Title 42, U.S.C.A., Section 1974; and this case lay dormant for a long period of time and while said case was dormant the United States of America filed an independent action seeking to obtain the same relief as was sought in the "Robert F. Kennedy" suit and other relief, and after there was only a partial hearing thereof which

was in the nature of the furnishing of testimony for the plaintiff, and that only, there was an attempt at appeal to the Circuit Court of Appeals by the Plaintiff on theory that there had been entered an order, when there had not been entered an order, and at a time when the defendant was ready and willing to proceed with his testimony in denial of that claimed for the Government of the United States, but this was not allowed and no final hearing has yet been had in that cause. However, that is a separate cause appearing in this Court by way of Petition for Writ of Certiorari, bearing Action Number 355, Theron C. Lynd, Circuit Clerk and Registrar of Voters of Forrest County, and the State of Mississippi, Petitioners, versus United States of America, Respondent. The opinion of the Circuit Court of Appeals in this cause refused and denied the right in petitioner to require application of Rules of Civil Procedure of the United States District Court, and to thereby deprive petitioner of due process and equal protection of law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States of America, being the same amendment which makes possible the Civil Rights legislation, and which should be as applicable and with as much favor to petitioner as to others who might be involved as citizens of the United States.

The record here consists of the pleadings and the opinion of the Circuit Court of Appeals and additional opinion on petition for rehearing, and none other, and certified copy thereof will accompany this petition as required by Rules of the Supreme Court of the United States.

It was on March 13, 1961, that petitioner served a motion "to remand this cause to the files, or suspend the proceedings herein, or dismiss same as abated * * * until Honorable Robert F. Kennedy has himself as Attorney General of the United States been properly substituted herein in

the place and stead of Honorable W. P. Rogers as United States Attorney General." An order for substitution was duly entered.

While the Title III proceeding was pending before United States Judge S. C. Mize and on July 6, 1961, the United States filed its complaint under 42 U.S.C.A. 1971, as aforesaid, naming the Registrar of Forrest County, Mississippi, and the State of Mississippi as defendants (R. 148). At the same time a motion for discovery was filed by the plaintiff under Rule 34, Federal Rules of Civil Procedure (R. 148). Early in January of 1962, United States Judge Cox announced that United States Judge Mize had transferred the Title III proceeding to him and that he would consider it at the same time he heard the Government's 1971 action. It was on hearing in relation thereto before United States Judge Cox that his opinion of January 15, 1962, was entered and a copy thereof appears in Appendix "E" hereto (R. 149). On February 16, 1962, there was a remand to the files of the District Court and said order appears in Appendix "F" hereto. That attempted in this cause for the office of the Attorney General of the United States in the first instance is based upon that order and which order provided that the application of the Attorney General "and all motions of the defendant heretofore filed herein, be and the same are hereby remanded to the Files of this Court." A notice of appeal was filed on March 16, 1962 (R. 150).

VI.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals for the Fifth Circuit erred as follows:

1. In holding that the order entered by the District Court remanding the cause to its files was an appealable order.

2. In limiting the judicial inquiry of the District Court solely to the question of whether the defendant-respondent registrar had been served with a duly written record demand by said Attorney General and to the question of whether the defendant-respondent registrar had been afforded notice of the pendency of the enforcement order proceedings.

3. In holding that the factual foundation for, or the sufficiency of, the Attorney General's "statement of the basis and the purpose" contained in the written demand, 42 U.S.C.A., Section 1974(b), is not open to judicial review or ascertainment.

4. In holding that there existed a "case or controversy" within the meaning of Article III, Section 2, of the Constitution of the United States, and at the same time holding that the Federal Rules of Civil Procedure were not applicable or available to petitioner.

VII.

REASONS RELIED ON FOR GRANTING THE WRIT.

The opinion of the Circuit Court of Appeals for the Fifth Circuit failed to recognize many fundamental issues of law; and said court held that there existed a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States and erroneously then held that the Federal Rules of Civil Procedure were not applicable and that petitioner could not avail himself thereof, to thereby deprive petitioner of due process and equal protection of the law guaranteed to him by the Constitution of the United States.

Under the Federal Rules of Civil Procedure, a trial court has right to control his docket and what constitutes application of the rules; and in this case there were pending at the same time two cases, one in the name of the Attorney General of the United States and the other in the name of the United States of America; and the office of the Attorney General of the United States, having total charge of the cause filed in the name of the United States of America, sought to obtain again all possible relief which could be obtained through and under the suit filed by the Attorney General of the United States, and that is to say that the suit of the United States of America enveloped and absorbed and consumed the first suit filed for the Attorney General of the United States, to thereby make unnecessary any attempt at litigating that contained in the suit of the Attorney General of the United States. Under these circumstances, the United States District Judge should have been permitted and allowed to follow Federal Rules of Civil Procedure in handling his own docket, and this has been denied him by the Circuit Court of Appeals for the Fifth Circuit. We are, therefore, contending here that every court has inherent power to control the disposition of causes on its docket with forthrightness and in order that justice may be done.

1. The order of the United States District Court constituting basis for the attempt at review by the Circuit Court of Appeals for the Fifth Circuit was not such an order as to admit therefrom an appeal, it not being a reviewable order.

In holding the order of the District Court remanding the cause to its files to be an appealable order the Circuit Court of Appeals for the Fifth Circuit relied solely upon the case of *United States* v. *Wood*, (C.C.A. 5th) 295 F.2d 772. Petitioner submits that the Wood case does not sup-

port the holding that the order here involved was appealable.

United States v. *Wood, supra,* was an action instituted in the United States District Court for the Southern District of Mississippi by the United States pursuant to Title 42, U.S.C.A., Section 1971 (b), (c), (d). The suit was brought on September 20, 1961, and sought to enjoin a state criminal prosecution of one John Hardy which was scheduled to take place on September 22, 1961. In its complaint, the Government alleged that the prosecution of Hardy was in bad faith and was being executed for the purpose of intimidating and coercing negro citizens of Walthall County, Mississippi, from registering to vote. The case came on to be heard on the Government's motion for temporary restraining order on September 21, 1961. After hearing, the District Court denied the Government's motion for temporary restraining order.

In holding the denial of the motion for temporary restraining order to be appealable under the particular and peculiar factual circumstances of that case, the Circuit Court of Appeals for the Fifth Circuit said at 295 F.2d 777:

> "To then call this de facto dismissal a nonappealable interlocutory order is to preclude review altogether. As a practical matter, then, it is clear that the denial of the restraining order is a final disposition of the Government's claimed right to prevent the prosecution of Hardy." *United States* v. *Wood, supra.*

Among the peculiar factual circumstances of that case considered by the Circuit Court of Appeals for the Fifth Circuit in reaching this conclusion was the fact that if the order denying the motion for temporary restraining order were held to be unappealable, then the trial of John Hardy would occur, and consequently, the case would be mooted and any right of appellate review would be destroyed. This

peculiar factual circumstance is the sole basis for the holding of said court in the *Wood* case to the effect that the District Court order was appealable. No such factual circumstance exists here because United States District Judge Cox entered no final order in the cause, and if the Government of the United States or the office of the Attorney General wanted the case lifted from the files and made active again, its right and remedy relating thereto would be by motion therefor, and which was not done.

Please note that in deciding the *Wood* case, the Circuit Court of Appeals for the Fifth Circuit engrafted another exception to the "finality rule" as embodied in 28 U.S.C.A., Section 1291. The United States Supreme Court had previously limited the "finality rule". See *Cohen* v *Beneficial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, and *Swift & Co.* v. *Compania Colombiana*, 339 U.S. 684, 94 L. Ed. 1206. Cf. *Parr* v. *United States*, 351 U.S. 513, 100 L. Ed. 1377, which delimits the scope and extent of *Cohen* and *Swift*. If it is a law that an order of the United States District Court remanding a case to the files is an appealable order, then there must be engrafted another exception, more of liberality with change in "finality rule". Petitioner respectfully submits that the practical effect of decisions such as that made by the Circuit Court of Appeals for the Fifth Circuit in this case makes "practical effect" a convenient and conventional catch-all phrase, totally outside of the true meaning and intent of the appeal statutes.

The Supreme Court of the United States has admonished the courts not to so construe the appeal statutes.

> "This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449,

451, 79 L. Ed. 583, 586, 55 S. Ct. 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain." *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 99 L. Ed. 233.

2. Said Circuit Court of Appeals erred in limiting the judicial inquiry of the United States District Court solely to questions of whether or not the defendant-respondent registrar had been served with a duly written record demand by said Attorney General and to whether the defendant-respondent registrar had been afforded notice of the pendency of the enforcement order proceedings.

The Circuit Court of Appeals for the Fifth Circuit held that when a demand was made by the Attorney General of the United States under Title III of the Civil Rights Act of 1960, for records, the United States District Court could not do other than determine that the written demand had been delivered to the registrar and that the registrar had notice of the pendency of the enforcement order proceedings. In this, said appellate court was in error. Said appellate court held that the Attorney General of the United States and petitioner were adverse parties and that the proceedings met the requirements of a "case or controversy" under Article III, Section 2, of the Constitution of the United States. Said appellate court then proceeded to divest Title III proceedings of many of the necessary elements of adversary proceedings and a "case or controversy" in said court, said court holding that the judicial inquiry of the District Court should be restricted to the two narrow unimportant issues aforesaid and that the controversy probably could not be litigated by the petitioner in the United States District Court. Stated differently, there was limitation to the rights of the District Court beyond all normal law.

In an adversary proceeding which constitutes a "case or controversy" the party has a right to judicial inquiry by the court in which the action is pending, and this is a necessary right and authority vested in all courts which may exercise the judicial powers vested in them under Article III of the Constitution of the United States, to determine all material issues in litigation. The Supreme Court of the United States has so held in many decisions and has adhered to this rule:

> "Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant." *Tuten v. United States*, 270 U.S. 468, 70 L. Ed. 738.

The error of the said Circuit Court of Appeals in this regard was in avoiding the natural and normal and ordinary interpretation of the words contained in said Title III enactment.

In determination of whether or not a statute is valid as a legislative assumption of judicial power, it is important to note whether all questions of a judicial nature are left to the judgments of the courts. See *Florentine* v. *Barton*, 2 Wall. 69 U.S. 210, 17 L. Ed. 786. It is clear that proceedings under Title III as interpreted by said Circuit Court of Appeals in this cause do not meet the standards set forth in the *Tuten* and *Florentine* cases. A review of the legislative history of said Title III requires the conclusion that Congress intended for District Courts to inquire into all material issues in actions thereunder.

Reference is here made to Report No. 956 of the House of Representatives, 86th Congress, 1st Session, which Report accompanied H. R. 8601, which was the Civil Rights Act of 1960, at page 7:

"Section 306 provides that in the event of nonproduction, jurisdiction would be conferred upon the Federal district courts to resolve any dispute which might arise in connection with the exercise of the authority conferred upon the Attorney General by this title including appropriate process to compel the production of the record or paper."

This Court may also be interested in the testimony furnished by Honorable Lawrence E. Walsh, Deputy Attorney General of the United States, one of the chief sponsors of the Civil Rights Act of 1960 at hearing before the Committee on the Judiciary, U. S. Senate, 86th Congress, 2nd Session, on H. R. 8601 held on March 28 and 29, 1960, and reported at page 9 thereof, as follows:

"In the event of nonproduction, jurisdiction is conferred upon the Federal District Courts to resolve any dispute which might arise in connection with the exercise of the authority conferred."

3. The Circuit Court of Appeals erred in holding that the factual foundation for, or the sufficiency of, the Attorney General's "statement of the basis and the purpose" contained in the written demand, 42 U.S.C.A., Section 1974(b), is not open to judicial review or ascertainment.

It is difficult to understand how said Circuit Court of Appeals concluded that the United States District Court was so limited and it is more difficult to understand how the language used in the Act should be so restrictively interpreted. The last sentence of Section 303 of Title III of the Civil Rights Act of 1960 is as follows:

"This demand will contain a statement of the basis and the purpose thereof."

The Civil Rights Act of 1960 as originally drafted did not contain the above quoted sentence. This sentence

was added by way of amendment in the House Judiciary Committee by Congressman Cramer of Florida, an opponent of the Act. Due to the press of time, the House Judiciary Committee did not file a report after the adoption of this amendment by it. However, at Volume 106, No. 54 of the *Congressional Record*, dated March 23, 1960, Congressman Cramer at Page 5940 of the Record gave the following explanation of the legislative purpose and intent in introducing and adopting this amendment:

> "I offered it because I felt the registrar or custodian was entitled to be put on notice as to why such an inspection was being made and as to what law or what constitutional provision, right, or immunity might be involved. It was for that reason that I was considering offering an amendment which would add to line 23, the following, 'and shall state its relation'—that means the demand—'to a right, privilege, or immunity secured or protected by the Constitution or laws of the United States.'
>
> "My discussion of the matter with many members of the House leads me to believe the present wording could be so interpreted and properly so. It was my intention in considering the amendment in the full committee that the Attorney General in making such a demand should advise the local registrar as to the intent and purpose of such a demand and as to the immunity, privilege, or the right that is intended to be involved in any investigation that might be under way and under what Federal law or constitutional provision. I trust this legislative record, particularly in view of the Attorney General's statement itself as evidence for the justification for that section in the bill, as it is contained on page 212 of the hearing at which place the Attorney General said:
>
> "'The Department feels the enactment of this proposal is essential to the effective enforcement of the provisions of the civil rights act of 1957.'

> "I do not mean to imply that my interpretation of Title III issuing powers on demand is that narrow and thus limited to the 1957 act because it is not. But at least it should have some relationship to the title and purpose of the bill, the title of the bill being 'to enforce constitutional rights.'"

The statement of the basis and purpose for the demand given by the Attorney General in his demand letter to Petitioner of August 5, 1960, is as follows:

> "This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction. The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred."

In view of that contained in the demand letter, your petitioner had limited knowledge or information as to what was expected or demanded of him or why the demand; and under the law petitioner was entitled to a full hearing on these areas not covered by the notice and thus the reason for the argument here made. From a study of the legislative history of the Act and the statutory language, there comes a compelling conclusion that the statement of the basis and purpose of the demand made to petitioner here did not meet the statutory requirements. In this connection, in statutory proceedings it is elemental that the power of judicial inquiry of the courts extend to a determination of whether an administrative agency, in presenting its claim, is within the terms of the statute.

> "Similarly, when the claim rests entirely upon a statute, it seems almost elementary that the defendant be entitled without being forced to go into fur-

ther procedures, to demand sufficient informative facts from the complaint to show that the plaintiff, if his facts be true, is actually within the terms of the statute in making his claim." *Daves* v. *Hawaiian Dredging Co.*, (U.S.D.C. Hawaii, 1953), 114 F. Supp. 643.

It follows that the demand made by the Attorney General on petitioner in this cause did not meet the statutory requirements and that said Circuit Court of Appeals for the Fifth Circuit erred in holding that the factual foundation for or the sufficiency of, the Attorney General's "statement of the basis and the purpose" contained in the written demand, 42 U.S.C.A., Section 1974(b), is not open to judicial review or ascertainment.

4. The Circuit Court of Appeals erred in holding that there existed a "case or controversy" within the meaning of Article III, Section 2, of the Constitution of the United States, and at the same time holding that the Federal Rules of Civil Procedure were not applicable or available to petitioner.

In *United States* v. *Lynd*, 301 F.2d 818, said Circuit Court of Appeals for the Fifth Circuit stated that an application for inspection under Title III "is, however, comparable to the form of a traditional order to show cause, or to produce in aid of an order of an administrative agency."

Rule 81 of the Federal Rules of Civil Procedure expressly sets forth the proceedings to which the Federal Rules are applicable. *Rule 81(a)(3)* provides in part as follows:

"These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an

officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the District Court or by order of the court in the proceeding; and (2) to appeal in such proceedings."

In Volume I, *Federal Practice and Procedure, Rules Edition*, Section 127, by Barron and Holtzoff, the provisions of said Rule 81 are explained as follows:

"The rules were clearly intended to apply to the United States, its officers and agencies, as well as to private litigants. The law writers support this view and the courts have generally construed the rules to apply not only to actions brought by the government, but to actions brought against it * * * obiter dicta having the slightest tendency to depart from the spirit of the rules, or to whittle out exceptions, ought to be accepted as authority only when no other course is possible."

In a footnote to the provisions quoted above we find the following:

"22. Rules binding in government cases. The Advisory Committee was pressed by government attorneys to make special provisions in the rules for cases to which the United States is a party. These would have destroyed the uniformity of application of the rules. The government must submit its litigation to the same rules of practice as any other litigant. A few special provisions were necessary. For example the United States is given sixty days instead of the usual twenty days in which to answer a complaint. Mitchell, Some of the Problems Confronting the Advisory Committee, 1937, 23 A. B. A. J. 966."

On March 28 and 29, 1960, at the hearings before the Committee on the Judiciary, United States Senate, 86th Congress, Second Session, on H. R. 8601 (Civil Rights Act of 1960) at page 142:

"Senator Carroll. Let me ask this one question. If we are going to amend this bill at all, what harm could come in a statement—we can make the legislative record in both of these hearings and on the floor of the Senate—but what harm could there be for us to state specifically that this bill is subject to the rules of civil procedure?

"Senator Johnston. That is the same question I have asked.

"Mr. Walsh. The answers are still the same: (1) It would be surplusage and (2) you run into the fact that we do not say that in each section, and if you start putting it in one section, why, you raise doubts as to the others.

"As to the legislative history, I think it should show that to the extent that the rules of the Federal procedure are not inconsistent with the express provisions of the statute, they do apply, because, you see, the rules themselves so provide and rule 1 says that it applies to all civil Federal proceedings, and there are certain listed exceptions which, of course, is not this one.

"Senator Carroll. In other words, we could make a legislative history, a historical legislative record—

"Mr. Walsh. Surely.

"Senator Carroll. Showing the intent, showing that it comes within the rules and it applies generally, without putting in some specific place in the bill.

"On the other hand, it seems to me we might, and we will consider this whether or not we could have a general statement to be all inclusive as to all sections.

"Mr. Walsh. I think the legislative history approach is far better."

Many cases exist which are applicable to the United States and relate to the enforcement of laws for production of documents in aid of administrative agencies. These cases come from throughout the country and in many cir-

cuits, but we will quote from one which involves the Circuit Court of Appeals for the Fifth Circuit and a decision of 1953 and which involves the Department of Internal Revenue and is identified with subpoena *duces tecum*, and we quote from the case as follows:

> "Appellant has failed to observe the important distinction between the administrative proceeding under (26 U.S.C.A. Sec. 3614), and court action to enforce the summons under 26 U.S.C.A. Section 366(a). Rule 81(a) (3) makes the rules of civil procedure applicable to 'proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States.' That means that the rules are applicable to the court action to enforce the summons under 26 U.S.C.A. Section 3633(a)." *Falsone* v. *United States*, 205 F.2d 734.

Enforcement of a subpoena issued by the tax court under the renegotiation act is governed by the rules. Rules 26(b), 30(b) and 45(b) apply in determining the scope of the subpoena. *Boeing Airplane Company* v. *Coggeshall*, 280 F.2d 654, 3 F.R. Ser. 2d 45d. 36 (App. D.C., 1960). Rule 43(a) is applicable in determining competency of a witness in a proceeding for enforcement of a summons of the Internal Revenue Service. *Baird* v. *Koerner*, 279 F.2d 623, 3 F.R. Ser. 2d 43(a).23 (C.A. 9th, 1960).

In accord with the general rule announced by the courts in cases involving officers and agencies of the government having subpoena powers, such as the Federal Trade Commission, and the National Labor Relations Board, we refer to *Federal Trade Commission* v. *Claire Furnace Company*, 274 U.S. 160, 47 S. Ct. 553 (1927); *Federal Trade Commission* v. *Maynard Coal Co.*, 22 F.2d 873 (App. D.C.), and *Dupont et al.* v. *Boland et al.*, 85 F.2d 12 (C.A. 2d, 1936). As stated in the latter case:

"The act does not permit or require actual enforcement of the order of the Board (National Labor Relations Board) * * * until there has been a full judicial review in the ordinary way. Appellant's right to contest the examination of records or the compulsion of testimony may be asserted when application is made to enforce a subpoena." *Dupont et al.* v. *Boland et al.*, supra.

Wherefore, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that this petition should be sustained and writ of certiorari issued as contemplated by law.

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Jackson, Mississippi,
FRANCIS T. ZACHARY,
M. M. ROBERTS,
Hattiesburg, Mississippi,

By .....,
M. M. Roberts,
Of Counsel for Petitioner.

APPENDIX "A".

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 19636

ROBERT F. KENNEDY, ATTORNEY GENERAL
OF THE UNITED STATES,

Appellant,

versus

THERON C. LYND, REGISTRAR OF ELECTIONS
OF FORREST COUNTY, MISSISSIPPI,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 19737

ROBERT F. KENNEDY, ATTORNEY GENERAL
OF THE UNITED STATES,

Appellant,

versus

MRS. MARY K. BRYCE, REGISTRAR OF VOTERS
OF BOSSIER PARISH, LOUISIANA,

Appellee.

No. 19738

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

MRS. WINNICE J. P. CLEMENT, REGISTRAR OF VOTERS OF WEBSTER PARISH, LOUISIANA,

Appellee.

No. 19739

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

SIDNEY WELLS PLATT, REGISTRAR OF VOTERS OF DESOTO PARISH, LOUISIANA,

Appellee.

No. 19740

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

U. CHARLES MITCHELL, REGISTRAR OF VOTERS OF CADDO PARISH, LOUISIANA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA.

(July 11, 1962)

Before RIVES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge. These cases from two District Courts in two States raise in a number of different

procedural ways the central question of the proper disposition of a Title III proceeding by the United States Attorney General for appropriate court orders to obtain "inspection, reproduction and copying" of voter records. Public Law 86-449, Title III, §§ 301-306, May 1960, 42 USCA § 1974.

A consideration of these two groups of cases from as many courts and states reflects a further common thread—a basic misconception by the respective trial Judges concerning a Title III proceeding. As this is a matter of recurring importance, we think it appropriate to make plain again that which we have tried so painstakingly to make plain before. That includes, without any reservations whatsoever, a reiteration of our prior decisions. These start with *In re Dinkens*, 5 Cir., 1961, 285 F.2d 430, approving and adopting the opinion and decision of Judge Johnson in *State of Alabama* v. *Rogers*, M.D. Ala., 1960, 187 F. Supp. 848; and the two subsequent decisions, *Kennedy* v. *Bruce*, 5 Cir., February 5, 1962, 298 F.2d 860; and *United States* v. *Lynd*, 5 Cir., April 10, 1962, 301 F.2d 818. A restatement of these principles will, we think, readily indicate the proper disposition of each of the individual cases.

At the outset we emphasize again that the filing of the application by the Attorney General is not the commencement of an ordinary, traditional civil action with all of its trappings. It is, however, comparable to the form of a traditional order to show cause, or to produce in aid of an order of an administrative agency. It certainly has the requisites of a "case or controversy" to satisfy the requirements of Article III of the Constitution. *In re Summers*, 1945, 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795; *Aetna Life Ins. Co. of Hartford* v. *Haworth*, 1937, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617. There are adversaries—the Attorney General seeking an order against the ob-

jecting State official as custodian. § 1974 b. The dispute is real and present as the application seeks "appropriate process," § 1974 d, in order "to compel the production" of records or papers demanded by the Attorney General in writing. § 1974 b. That by its terms and operation, Title III narrowly circumscribes the issues upon which the Court is to act does not make the proceeding or that determination any less judicial. For "in passing upon the application [to issue or not issue an order to produce] the court exercises judicial judgment. It does not confer or withhold a favor." *Tutun* v. *United States*, 1926, 270 U.S. 568, 578, 46 S. Ct. 425, 70 L. Ed. 738.

But this is not, we repeat, the ordinary civil action. It is a special statutory proceeding in which the courts play a limited, albeit vital, role. In words adopted as our own, we said that Title III provides "an effective means whereby preliminary investigations of registration practices can be made in order to determine whether or not such practices conform to constitutional principles" 187 F. Supp. 848, 853. Relying on the principles expounded in *Hannah* v. *Larche*, 1960, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307, we translated them effectively in specific terms of a Title III proceeding. "Here the function sought to be exercised by the Attorney General is—as in Hannah—purely investigative." 187 F. Supp. 848, 854.

Since it is a special statutory proceeding, it does not require pleadings which satisfy usual notions under the Federal Rules of Civil Procedure. All that is required is a simple statement by the Attorney General that after a § 1974 b written demand for inspection of records and papers covered in § 1974, the person against whom an order for production is sought under § 1974 d has failed or refused to make such papers "available for inspection, reproduction, and copying * * *."

There is no place for a motion for a bill of particulars or for a more definite statement under F. R. Civ. P. 12 (e). There is no place for any other procedural device or maneuver—either before or during any hearing of the application—to ascertain the factual support for, or the sufficiency of, the Attorney General's "statement of the basis and the purpose therefor" as set forth in the written demand. § 1974 b. Thus with respect to the reasons why the Attorney General considers the records essential, there is no place, either as a part of pleadings, discovery, or trial, for interrogatories under F. R. Civ. P. 33, oral depositions of a party under F. R. Civ. P. 26 (a), 30, production of documents under F. R. Civ. P. 34, or request for admissions as to facts or genuineness of documents or other things under F. R. Civ. P. 36, 37. The same is true as to the nature, kind or specification of the records and papers sought, the names, identities or addresses of persons thought to have received discriminatory treatment, whether favorable or adverse, and the like.

On the filing of this simple statement by the Attorney General, the Court is required to treat it as a summary proceeding. The Court, with expedition, should grant the relief sought or, if the respondent-custodian opposes the grant of such relief, the matter should be set down without delay for suitable hearing on the matters open for determination. These are, of course, severely limited. In the event of a genuine dispute thereon, it would be in order for the Court to determine whether the written demand has been made, § 1974 b, or whether the custodians against whom orders are sought have been given reasonable notice of the pendency of the proceeding. On the other hand, the factual foundation for, or the sufficiency of, the Attorney General's "statement of the basis and the purpose" contained in the written demand, § 1974 b, is not

open to judicial review or ascertainment. Nor is the scope of the order to produce insofar as it concerns the nature of the records or papers. This is so because the papers and records subject to inspection and demand have been specifically identified by Congress. The Attorney General is entitled to have made available for his "inspection, reproduction and copying" in the custodian's office "any record or paper" which § 1974 requires "to be retained and preserved." The incorporated standard of § 1974 is sweeping. Every election officer is required to retain and preserve "* * * all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting" in the specified elections for federal offices.[1] If, after issuance of an order to produce, a genuine dispute subsequently arises as to whether or not any specified particular paper or record comes within this broad statutory classification of "all records and papers * * * relating to any * * * act requisite to voting," the Court would, of course, be open for its determination.

Likewise, there is no question for judicial determination as to how far back the records go. This, too, is fixed by the statute. In other words, Congress has determined *what* records are to be retained and subject to production. Since the statute specifies "all records and papers" in the officer's custody "relating to any application * * * or other act requisite to voting * * *," in such elections held within

1. The time and the nature of the elections are tied together as § 1974 provides that all such records shall be retained and preserved "for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for * * *."

twenty-two months, the custodians' duty to retain and preserve and the Attorney General's right of inspection and copying extend as far back as the earliest date of any such record or paper which bears on the eligibility of any currently listed voter to vote in such election.[2] If after granting the order as to all such records back to the time of the earliest federal election within the 22-month period preceding the filing of the § 1974 application, any substantial question arises concerning the most remote date beyond that time, the court will be open to determine that issue on the basis of the statutory standard. But the cutoff date is in no way related to the identity or status of "the person having custody, possession, or control," § 1974 b, or the time at which any such person acceded to or terminated such office.

Similarly, the right of the Attorney General to inspect and copy such records is not dependent upon an existing demonstrable right in the United States or the Attorney General to successfully maintain an injunction suit under, or similar to, § 1971 (a)-(f) against any present or preceding election officer. His right to records does not require that he show he could win without them. The right of the Attorney General to secure judicial enforcement of the written demand, § 1974 b, is not affected in any way by the pendency of a § 1971 case or the right of discovery in such case under the Federal Rules of Civil Procedure. The two proceedings are distinct and distinctively separate.

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2. Thus, for example, in Alabama where registration is permanent and reregistration is not required, this would extend as far back as the earliest application for registration of any person eligible to vote in the most recent federal election. See *State of Alabama* v. *United States*, 5 Cir., 1962, , F.2d , , note 7 and appended text [No. 19051, June 1, 1962]. Provision is made in Louisiana also for certain permanent registrations. See L.R.S. 18:231-261, Acts 1952, No. 415, § 2 as amended Acts 1954, No. 250, § 1 *et seq.*

This analysis demonstrates the narrowly confined issues open for judicial review or ascertainment. The restricted substantive nature of the proceeding consequently limits in like manner the place of, the resort to, or the application of procedural rules or devices as well as the scope and nature of any hearings required and the evidence admissible thereon.

With these principles clearly in mind, the disposition of each of the separate cases is readily made.

No. 19636

Lynd, Registrar Forrest County, Mississippi

There is no necessity for going into any detail. It suffices to say that over 18 months ago the Attorney General on January 19, 1961, filed his Title III application for an order requiring the Registrar to make available for inspection and copying all records or papers in his possession relating, in the words of the statute, to the elections for federal office. This was to secure the inspection demanded in writing on August 11, 1960. After a series of motions, motions to dismiss, opposing substitution, motions for more definite statement and briefs and repeated extended oral arguments thereon, but with no clear-cut ruling, no indication that this interminable proceeding would ever come to an end, and certainly never an order for production, the District Court effectually denied the Attorney General's applicatoin.

The stated reason was that subsequent to the § 1974 application, the Attorney General in the name of the United States filed a § 1971 complaint against Lynd, as Registrar, seeking injunctive relief for discriminatory practices.[3] In

3. It was nonaction in this very case, construed by us to be an effectual denial of preliminary relief, that led to our injunction pending appeal in *United States* v. *Lynd*, 5 Cir., April 10, 1962, 301 F.2d 818.

the course of that proceeding, and on the Government's broader motion under F. R. Civ. P. 34, the Court had ordered the production of certain but limited voter records. The Government contends that this Rule 34 order was too restricted, but this issue is not before us directly. The District Court in its opinion concluded that "the Attorney General has instituted two separate suits against the same defendant and that the later [§ 1971 discrimination] suit embraces all of the subject matter contained in the former [§ 1974] suit." Consequently, the Court went on, by filing his Rule 34 motion the Attorney General "thereby abandoned in its entirety" the § 1974 application so that "the entire cause of action now pending before" the District Court in both the § 1974 and § 1971 cases "is embraced and contained in * * * [the § 1971] amended complaint and motion under Rule 34." On the basis of that the Court ruled that all of "the six motions pending in [the § 1974 proceeding] have been rendered and are academic and moot by reason of the abandonment of said * * * suit * * *." Then to snuff out the last vestige of life in this abandoned cause the Court, administering the *coup de grace*, declared that it "adjudges [the § 1974 proceeding] as abandoned and effectually nonexistent." On the basis of this opinion incorporated expressly in his order, the District Court then "ordered that this cause, and the complaint * * * be and the same are hereby remanded to the files of this Court."

We first reject the contention that this was not such a final order as to be appealable, 28 U.S.C.A. § 1291, *United States* v. *Wood*, 5 Cir., 1961, 295 F.2d 772, 777.

On the merits, the action is clearly wrong. The Title III proceeding is investigative in nature. Its purpose is to enable the Attorney General to determine whether § 1971 suits or similar actions should be instituted. And it is to enable him to obtain evidence for use in such cases if and

when filed. The Attorney General does not exhaust the § 1974 right which Congress accorded to that office by the filing of a § 1971 injunction suit. The discovery mechanisms available in such injunction action are necessarily geared to that particular claim. Questions of relevancy or good cause or other like considerations which must be evaluated in the injunction suit are completely foreign to the summary proceeding under § 1974.[4] Indeed, one of the clearest purposes of the Title III proceeding is to enable the Attorney General to assemble all of the voter record information within the time-reach of the statute relating to all persons as to whom there is a question concerning infringement or denial of their constitutional voting rights. Wide scope must be accorded the Attorney General in the facilities for adequate investigation. Relief under § 1971 (c) is not confined to named individual voter officials but extends as far as the sovereign State itself. The establishment of a discriminatory "pattern or practice" sets in motion the extraordinary remedies of § 1971 (e). Establishing a "pattern or practice" of such discrimination may go back many, many years. *State of Alabama* v. *United States*, 5 Cir., 1962, ___ F.2d ___ [No. 19051, June 1, 1962]. Clearly within the time cutoff period of § 1974, the Attorney General, in fulfillment of the duties imposed upon him by the Civil Rights Act of 1957 and 1960, is entitled to inspect and copy all of the voter papers and records as defined.

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4. This is not to disparage the wonderful flexibility of such discovery weapons. Thus, for example, the scope of examination in pretrial depositions under F. R. Civ. P. 26 (b), and for production of documents under F. R. Civ. P. 34 in a § 1971 suit might well have to go back many, many years as a basis for establishing a pattern or practice of discrimination, § 1971 (e), or in leading to the "discovery of admissible evidence," F. R. Civ. P. 26 (b), to establish such pattern. At the same time, depending on the local registration system, the Attorney General's right under § 1974 might go back only 22 months, § 1974.

There is no longer any question about the respondent Lynd having actual notice of this application. The record establishes without contradiction that the § 1974 b written demand was made and that it adequately stated the basis and the purpose therefor.[5] There is nothing left in dispute. Consequently, the order of the District Court must be vacated, and the District Court is directed to grant without further delay the application to have these records made "available for inspection, reproduction, and copying at the principal office of such custodian" as requested. The mandate of this Court shall issue forthwith.

No. 19737 — Bossier Parish

No. 19738 — Webster Parish

No. 19739 — DeSoto Parish

No. 19740 — Caddo Parish

These cases were consolidated and heard together, both below and here. The District Judge, acutely aware of our prior decisions in *Kennedy* v. *Bruce*, 5 Cir., February 5, 1962, 298 F.2d 860, the earlier approval of Judge Johnson's decision and our even more recent decision in *United States* v. *Lynd*, 5 Cir., April 10, 1962, 301 F.2d 818, displayed an earnest concern that the decision comply fully with the principles we had announced. Despite the heavy demands of that busy District, Judge Dawkins heard and decided all four of these § 1974 applications within sixty days of their filing by the Attorney General on April 4, 1962. In each case there was an identical written demand, § 1974 b, and

5. It was substantially in the same words as the Louisiana demands, see note 6, *infra*.

an express refusal upon the part of each Registrar to comply.[6]

The District Judge applying, as he was bound to, the principles we have expounded rejected the contentions asserted by each of the Registrars that the statement of "the basis and purpose therefor" in the letter demand was inadequate; that the demand as made would be in conflict with applicable Louisiana statutes; that there was no necessity for the inspection (at least in two Parishes) since there was no discrimination; and that Title III was unconstitutional. As to two of the Parishes, further objection was made that all or a part of these records had already been inspected and copied by the United States Civil Rights Commission. There was also an effort to limit any inspection and copying to a period of 22 months after November 6, 1961, or 22 months after the November, 1962, election. The Registrars also sought specific conditions limiting the number of representatives of the United States Attorney General, approval by the Court of the copying methods, and prohibiting the inspectors from questioning the Registrar's staff. All of these the District Judge, for adequate reasons, likewise overruled. As he was compelled to do, the Judge also rejected the contention that the Attorney General be required to specify the records.

Having done that, the District Court then proceeded to enter orders granting the right of inspection and copying,

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6. The letter of United States Attorney General made this "statement of the basis and the purpose therefor," § 1974 b:

> "This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction.
>
> "The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred."

but he attached certain conditions to which the United States Attorney objects. It is our conclusion here that these conditions were erroneously attached and, as in the other case, this largely resulted from a basic, though more narrowly confined, misconception of the nature and purpose of a Title III proceeding.

As to Bossier and Webster Parishes, the Court declined to allow inspection and copying of records prepared or compiled prior to April 1, 1961, on the ground that in April, 1961, the United States Civil Rights Commission had inspected and copied voting records in those Parishes. As to the Attorney General's suggestion that the Department of Justice might not be able to get these records from the Civil Rights Commission, the Judge then provided that upon such a showing the order would be modified to allow inspection and copying of all voting records subsequent to the accession to office of the present Registrars.

We think this misconceives the underlying nature of a Title III proceeding. Congress has specifically committed the investigative responsibility to the Attorney General and has equipped him with machinery thought suitable for the effective fulfillment of that obligation. Congress has specified the person *who* shall seek. It has specified, as well the person from *whom* the information shall be obtained. The latter is, of course, the custodian of the records, not the Federal Civil Rights Commission.

Undoubtedly Judge Dawkins—probably from his intimate contact with the work of the Civil Rights Commission as it came before his Court in the activity leading to *Hannah* v. *Larche*, 1960, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307—felt that this current contemporary demand was oppressive and burdensome because it was a complete duplication. Where a District Judge actually finds that this is

the situation, we have no doubt that in administering § 1794 d the power and duty to issue "appropriate process to compel the production" of such records and papers will include the power and duty to issue protective orders as well. But it seems quite likely from a consideration of the reports of the Civil Rights Commission to which we have been directed as a matter of judicial knowledge that a number of the records and papers which might well be important to the Attorney General were not copied by that Commission whose statutory function is quite different. Undoubtedly overlooked, also, was the technical problem facing the Attorney General in the future use of copies made or obtained from copies in the custody of the Civil Rights Commission.. On the other hand, authenticity and admissibility of those made in the office of the Registrars would be quite clear. 28 U.S.C.A., §§ 1731, 1732.

The District Court was likewise in error in refusing to require the Registrars to produce those records prepared or compiled prior to the incumbency of the present Registrar. This was done presumably on the theory that the present Registrar could not be held responsible for acts and practices of his predecessors. This is again the basic error of confusing a Title III proceeding with an action for injunctive or other relief under § 1971. Here the Registrar is a party, not because the Attorney General is seeking a judicial declaration that such official has violated federal statutes or constitutional rights. The Registrar is a party because he is, in the words of the statute, the "officer of election," § 1974 e, and is the "person having custody, possession, or control of such record," § 1974 b. The statute, subject only to the time cutoff prescribed, requires the retention and preservation of "all records and papers which come into his possession relating to any * * * act requisite to voting * * *." § 1974. All means all. The responsibility of

such "officer of election" is not confined to records which are compiled subsequent to his taking office. His responsibility is as extensive as the cutoff date and whatever has come into his custody, possession or control from his predecessors, he must faithfully keep under the sanction of a fine or imprisonment if he "wilfully fails to" retain and preserve them as required, § 1974. As pointed out above, under § 1971 (c) and (e), the records and papers have an immediate importance as a likely source of significant information in determining the existence of a "pattern or practice" or conduct by current or prior voting officials which will "also be deemed that of the state."

We think also that it was erroneous for the District Court to prescribe that the inspection and copying should not commence until after September 1, 1962. The Court was, we know, concerned about possible interference with the performance of regular duties by these Registrars, several in very cramped and perhaps limited quarters, in connection with the primary election to be held in Louisiana on July 28, 1962, with the possibility that this would be followed by another primary on September 1. But we do not think that the record made before the District Court affords any real convincing reason why this much delay is required. For a proceeding commenced in April, 1962, the disposition would hardly be the prompt one which our decisions require if effective compliance is to be postponed five months. We think two things are of great importance in dealing with this problem. First, we are not discussing confidential, private papers and effects. We are, rather, dealing with public records which ought ordinarily to be open to legitimate reasonable inspection and which by nature relate directly to the most vital of all public functions—the franchise of the citizen. Next, once it is recognized—as it surely must be now—that this act of Congress is valid and

that Court decisions unmistakably indicate that the congressional objective of a prompt and expeditious inspection is to be achieved, we think there is really nothing to these mechanical objections. Copying 100 or 1,000 sheets would, at one time, have been a formidable thing. Modern photostating equipment will make short order of most of these demands, and where the task is more complicated because of volume or the pressure of contemporary interruptions for normal office operation, we are confident that with only slight personal adjustments, the agents of these dual sovereigns should be able to work out a reasonable schedule without putting that policing task upon the overburdened shoulders of a United States District Judge.

The result is that we sustain the appeal of the Attorney General. We hold that each of the conditions attached to the order to produce was erroneous. But in all other respects the orders were proper. Consequently, we reject all of the attacks asserted by the appeals (or cross appeals) of the Registrars. The orders are modified by deleting the conditions which we have found to be erroneous. As thus modified, the orders are affirmed and remanded to the District Court to fix consistent with this opinion a beginning time for the inspections. The mandate of this Court shall issue forthwith.

APPENDIX "B".

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1961

No. 19,636

D. C. Docket No. 1604 Civil (Hattiesburg)

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,
Appellant,

vs.

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before Rives, Brown and Wisdom, Circuit Judges.

Judgment

(Filed July 13, 1962. Loryce E. Wharton, Clerk, Southern District of Mississippi.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be, and the same is hereby, modified in accordance with the opinion of this Court, and as thus modified that said order be, and it is hereby, affirmed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

July 11, 1962

Issued: July 11, 1962.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
By /s/ Clara R. James
Deputy

New Orleans, Louisiana

July 11, 1962.

APPENDIX "C".

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19636

ROBERT F. KENNEDY, as Attorney General
of the United States,
Appellant,

vs.

THERON C. LYND, Registrar of Elections of
Forrest County, Mississippi,
Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi.
(August 8, 1962.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

APPENDIX "D".

Text of Constitutional Provisions and Statutes Involved.

1. The Fourteenth Amendment to the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice

President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

2. Title III to Civil Rights Act of 1960 (42 U.S.C.A.):

"§ 1974. Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation.

Every officer of election shall retain and preserve, for period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, regis-

tration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both."

"§ 1974a. Theft, destruction, concealment, mutilation, or alteration of records or papers; penalties.

Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 1974 of this title to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both."

"§ 1974b. Demand for records or papers by Attorney General or representative; statement of basis and purpose.

Any record or paper required by section 1974 of this title to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor."

"§ 1974c. Disclosure of records or papers.

Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this subchapter, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury."

"§ 1974d. Jurisdiction to compel production of records or papers.

The United States district court for the district in which a demand is made pursuant to section 1974b of this title, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper."

"§ 1974e. Definitions.

As used in this subchapter, the term 'officer of election' means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico."

3. Rule 81 (a)(3), Federal Rules of Civil Procedure:

"(a) To What Proceedings Applicable.

"(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9

(44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings."

4. 28 U.S.C.A., Section 1291:

"§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

5. 28 U.S.C.A., Section 1292 (1):

"§ 1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

APPENDIX "E".

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION.

Civil Action File Number 1604

IN RE THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI

This case is presented on motion to quash the demand of the Attorney General made on respondent under 42 U.S.C.A., Section 1974b motion for a more definite statement of the *basis* and *purpose* for said demand and four separate motions of the respondent to dismiss the suit.

The discovery was not supplied by the respondent pursuant to the demand of the Attorney General and this suit was accordingly filed as an ex parte case pursuant to 42 U.S.C.A., Section 1974d. These statutes were apparently designed and intended to operate as an administrative procedure for obtaining discovery without suit if possible and with suit if necessary. The statute does not expressly authorize an ex parte action for this purpose and it would appear to the Court that if the statutory demand is refused that the necessary action would be adversary in form and in fact but that observation is unimportant now.

This suit was commenced by an instrument captioned Application for Order to Produce Records for Inspection, Reproduction and Copying which was filed in this court on January 19, 1961, as Cause Number 1604 on the docket of this court. Subsequently, on July 6, 1961, the Attorney General filed the complaint of United States of America against Theron C. Lynd, Circuit Court Clerk and Registrar, Forrest County, Mississippi, et al., under 42 U.S.C.A., Section 1971, et seq. as Cause Number 1646 on the docket of this court. On October 10, 1961, the Attorney General filed

an amended complaint in said Cause Number 1646 styled United States of America, Plaintiff, v. Theron C. Lynd, et al., Defendants, seeking the injunctive relief provided for in said Act and accompanied by a motion under Rule 34 of the Federal Rules of Civil Procedure to require the Defendant to produce and permit the inspection and copying of the same records sought in Cause No. 1604 on the docket of this court, aforesaid.

It is the opinion of this Court under the circumstances that the Attorney General has instituted two separate suits against the same defendant and that the later suit embraces all of the subject matter contained in the former suit; and that when the complaint in Cause No. 1646 was filed accompanied by its Rule 34 motion that the Plaintiff thereby abandoned in its entirety said Cause Number 1604; and that when the Plaintiff filed its amended complaint in Cause No. 1646 on October 10 and filed its motion under Rule 34 under said amended complaint on October 18, 1961, that it abandoned the original complaint; and that the entire cause of action now pending before this Court in Case No. 1604 and Case No. 1646 is embraced and contained in said last mentioned amended complaint and motion under Rule 34.

It is accordingly the opinion of the Court that the six motions pending In Re Theron C. Lynd, etc., No. 1604, have been rendered and are academic and moot by reason of the abandonment of said former suit by the subsequent suit in this court embracing the same subject matter and other relief therein requested. The Court, therefore, declines to act on either of said motions and adjudges Case No. 1604 as abandoned and effectually non-existent and a proper order to the effect indicated may be presented for entry.

This January 15. A. D., 1962.

/s/ Harold Cox,

United States District Judge.

APPENDIX "F".

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION.

Civil Action No. 1604

IN RE: THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI
ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

vs.

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI.

Order

(Filed February 16, 1962, Loryce E. Wharton, Clerk, By: Margaret Estes, Deputy, Southern District of Mississippi)

Pursuant to memorandum opinion of this Court issued on January 15, 1962, which is made a part hereof, it is hereby ordered that this cause, and the complaint and all motions of the defendant heretofore filed herein, be and the same are hereby remanded to the files of this Court.

ORDERED, ADJUDGED AND DECREED, this the 16th day of February, 1962.

s/ Harold Cox
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 576

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI, PETITIONER

v.

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 148–149) is not reported. The opinion of the court of appeals (R. 154) is reported at 306 F. 2d 222.

JURISDICTION

The opinion (R. 154–170) and order (R. 171) of the court of appeals were entered on July 11, 1962. Petitioner's motion for rehearing was denied on August 8, 1962 (R. 197). The petition for a writ of certiorari was filed on November 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the order of the district court remanding the cause to its files was an appealable order.

2. Whether the Attorney General's demand for records complied with requirements of Title III of the Civil Rights Act of 1960 in stating the "basis and purpose" of the request.

3. Whether the district court erred in treating the Title III enforcement proceeding as mooted by the filing of a Rule 34 motion in a subsequent proceeding under 42 U.S.C. 1971.

STATUTE INVOLVED

Title III of the Civil Rights Act of 1960 (74 Stat. 86, *et seq.*, 42 U.S.C., Supp. II, 1974, *et seq.*) provides:

> SEC. 301.—Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve

any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 302.—Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 301 to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 303.—Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

SEC. 304.—Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

SEC. 305.—The United States district court for the district in which a demand is made pur-

suant to section 303; or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

SEC. 306.—As used in this title, the term, "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

STATEMENT

On August 11, 1960, acting pursuant to section 303 of the Civil Rights Act of 1960 (42 U.S.C. 1974(b), 74 Stat. 88), the Attorney General requested the Registrar of Elections of Forrest County, Mississippi, to make available for inspection and copying various records and papers pertaining to registration and voting (R. 3; 6–7). On August 23, 1960, counsel for petitioner requested a ninety-day extension in which to reply (R. 4; 7–8). The government agreed to a twenty-one day extension until September 16, 1960 (R. 4; 8–9). On September 15, 1960, counsel for petitioner repeated the request for the full ninety-day extension (R. 4, 9–10). On October 10, 1960, petitioner declined to turn over the records, but some indication was

given that compliance might be forthcoming (R. 4–5; 10–11). When negotiations failed, an enforcement action was filed (January 19, 1961) (R. 2). At that time, the district court designated March 13, 1961, as the date for hearing.

On March 13, 1961—moments before the hearing was scheduled to commence before Judge Mize (R. 18)—counsel for petitioner served a motion "to remand this cause to the files, or suspend the proceedings herein, or dismiss same as abated * * * until Honorable Robert F. Kennedy has himself as Attorney General of the United States been properly substituted herein in the place and stead of Honorable W. P. Rogers as United States Attorney General" (R. 11–12). Deeming the question of substitution "very important" (R. 36), the judge continued the hearing, allowing 45 days to brief the point (R. 37–38). Although respondent did not believe that a formal substitution was necessary under the circumstances, nevertheless, in order to expedite the proceeding, he submitted a motion to substitute himself for former Attorney General Rogers. On April 4, 1961, the court ordered the substitution (R. 39–40).

Thereafter, counsel for petitioner requested an additional sixty day extension in which to plead (R. 42–47). On April 13, 1961, the district court granted petitioner thirty days in which to file all preliminary motions and an additional ten days in which to file an answer and any further motions (R. 47–48). On May 22, 1961, another hearing was held before Judge Mize (R. 72). At that time petitioner submitted numerous motions, unaccompanied by support-

ing legal memoranda (R. 58–71). Several motions attacked the constitutionality of Title III of the Civil Rights Act of 1960 (R. 70–71). Counsel for the government, relying on *In re Crum Dinkens*, 187 F. Supp. 848 (M.D. Ala.), affirmed, 285 F. 2d 430 (C.A. 5), certiorari denied, 366 U.S. 913, urged that briefing the constitutionality of Title III was unnecessary (R. 93–94). But Judge Mize permitted the petitioner forty days to brief the constitutionality of Title III, as well as the procedural matters raised by petitioners. The government was given fifteen days to respond (R. 88). The government's response was filed on July 18, 1961.

While the Title III proceeding was pending before Judge Mize, on July 6, 1961, the United States filed a complaint under 42 U.S.C. 1971, naming as defendants the Registrar of Elections of Forrest County and the State of Mississippi (R. 148).[1] At the same time a motion for discovery was made under Rule 34, Federal Rules of Civil Procedure (R. 148). Early in January, 1962, Judge Cox announced that Judge Mize, who had had the Title III proceeding under advisement since July 18 and had not yet decided it, had transferred that proceeding to him and that he would consider it at the same time he heard the government's section 1971 action. A hearing was held before Judge Cox on January 13, 1962, at which the arguments previously made were repeated (R. 96, *et seq.*). On January 15, 1962, Judge Cox rendered an

[1] Section 1971 broadly authorizes the United States to institute a civil action for preventive relief where there is interference or threatened interference with the right to vote.

opinion in which he held that by filing the 1971 action the government had abandoned its Title III proceeding.

Shortly thereafter, on January 26, 1962, Judge Cox entered an order in the section 1971 action striking from the complaint all incidents antedating February 26, 1959—the beginning of the tenure of the present registrar. He ruled that all evidence and testimony in the case would be limited to the period following February 26, 1959. And, on March 7, 1962, at the close of the hearing on the preliminary injunction in the section 1971 suit, the court granted the government's motion for discovery under Rule 34 but restricted it to records—*e.g.*, voting applications, affidavits and certificates to vote, and transfer applications—made during the tenure in office of the present registrar (February 26, 1959 to the present).

On February 16, 1962, the district court entered a formal order in the Title III proceeding in conformity with its opinion of January 15, 1962, in which it directed that the Attorney General's application "and all motions of the defendant heretofore filed herein, be and the same are hereby remanded to the files of this Court." On July 11, 1962, the court of appeals vacated the order of the district court and directed it to grant respondent's application to inspect the voting records of Forrest County.[2]

[2] The district court issued the enforcement order on August 2, 1962, and the government has inspected and photographed records which were in Mr. Lynd's possession on August 10. Since, however, it may well become necessary for the government to inspect records which will have accrued after August 10, 1962, the issues raised by petitioner cannot be considered moot.

ARGUMENT

1. The order of the district court was final and appealable. The order of February 16, 1962 provided that "the complaint and all motions of the defendant heretofore filed herein, be and the same are hereby remanded to the files of this Court" (R. 156). In its opinion, the district court made clear the degree of finality it attached to this action. It said (R. 149):

> * * * when the complaint in Cause No. 1646 [the 1971 action] was filed accompanied by its Rule 34 motion * * * the Plaintiff thereby abandoned in its entirety said Cause Number 1604 [the Title III proceeding] * * *. The Court * * * adjudges Case No. 1604 as abandoned and effectually non-existent and a proper order to the effect indicated may be presented for entry.

When the district court remanded the Title III proceeding to the files, it effectively refused enforcement to the rights of respondent. It obviously intended its order to make a final disposition of the action before it. And it determined substantial rights of the parties which would have been irreparably lost if the appellate court had not acted. *Kennedy* v. *Bruce*, 298 F. 2d 860, 863–864 (C.A. 5). See also *United States* v. *Lynd*, 301 F. 2d 818 (C.A. 5), certiorari denied, No. 355, October Term 1962. The order clearly met the test of finality governing appeals. Cf. *United States* v. *Wood*, 295 F. 2d 772, 778 (C.A. 5), certiorari denied, 369 U.S. 850; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541; *Sears, Roebuck & Co.* v.

Mackey, 351 U.S. 427; *Burns* v. *Ohio*, 360 U.S. 252; *Swift & Co.* v. *Compania Colombiana Del Caribe*, 339 U.S. 684; *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330 (C.A. 5).[3]

2. Petitioner contends (Pet. 15) that the demand for records made upon him by the Attorney General did not satisfy the statutory requirement that "[t]his demand shall contain a statement of the basis and the purpose therefor," and that the court of appeals erred in holding that "the factual foundation for, or the sufficiency of, the Attorney General's statement * * * is not open to judicial review or ascertainment."

The short answer to this contention is that the Attorney General's request for records did state the basis and purpose of the demand. The initial letter to the registrar expressly stated (R. 6):

> This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction.
>
> The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred.

Considering the summary nature of the proceeding contemplated, these allegations are clearly sufficient and there was no occasion for a motion for a more

[3] *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, cited by petitioner (Pet. 9–10), did not involve an order which effectively disposed of the controversy. The order in *Bodinger* was merely a denial of a stay to permit special arbitration proceedings.

definite statement under Rule 12(e) of the Federal Rules of Civil Procedure. See *United States* v. *Lynd, supra; In re Crum Dinkens,* 187 F. Supp. 848, affirmed (*sub nom. Dinkens* v. *Attorney General*), 285 F. 2d 430, certiorari denied, 366 U.S. 913;[4] *Kennedy* v. *Bruce, supra; In re Coleman,* 208 F. Supp. 199 (S.D. Miss.). In any event, Title III of the 1960 Act does not contemplate judicial review of the basis for the Attorney General's action. See *In re Crum Dinkens, supra;* see also, 106 Cong. Rec. 7767, remarks of Senator Keating.

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[4] In *Dinkens*, the Attorney General objected to interrogatories served upon him—interrogatories seeking information essentially similar to that sought pursuant to Rule 12(e) in the instant case. His objection was sustained by the district court (Transcript of Record, *Dinkens* v. *Attorney General*, No. 18562, pp. 20, 38, 48) (C.A. 5). On appeal, the Board of Registrars of Montgomery County, Alabama, specifically alleged as error the district court's failure to require a response to the interrogatories (Brief for Appellants, pp. 3, 6–7). The Attorney General, in his brief, argued that the district court properly disposed of the interrogatories (Brief for Appellee, pp. 28–31). The court of appeals affirmed the judgment of the district court, 285 F. 2d 430. Again, in their petition for writ of certiorari, the Board of Registrars presented the question of whether "the Attorney General can be compelled to disclose the names and addresses of persons having knowledge of the relevant facts which form the basis of the demand and application for relief thereunder" (Petition for Certiorari, p. 2, No. 823, October Term 1960), and specifically argued that "the Courts below erred in refusing to require the Respondent to answer interrogatories 9, 10 and 11" (Petition for Certiorari, *supra*, p. 6). The response to the petition challenged this contention of the Board of Registrars (Brief for Respondent, p. 8).

3. Under Title III of the Civil Rights Act of 1960, the Attorney General was entitled to an order making voting records promptly available. *Kennedy* v. *Bruce*, *supra*. Instead, more than a year after the filing of the government's application, the court still refused to enter such an order, on the theory that the government had "abandoned" its Title III proceeding by bringing an action under 42 U.S.C. 1971 against the same defendant and filing a Rule 34 motion therein (R. 148–149). As above indicated, the district court did grant the government's motion for discovery under Rule 34 in the section 1971 proceeding, some three weeks after denying the Title III application, but limited it in three significant respects: (1) it did not grant the motion until the government had completed its case on the motion for preliminary injunction; (2) it denied access to documents antedating February 26, 1959; and (3) it refused discovery of poll tax books and lists. The net result is that the Attorney General was denied the prompt and complete compliance to which he was entitled in the Title III proceeding.

Thus, it was plainly wrong to view the Rule 34 motion as terminating the Title III proceeding. The court of appeals correctly held that "[t]he right of the Attorney General to secure judicial enforcement of the written demand, § 1974b, is not affected in any way by the pendency of a § 1971 case or the right of discovery in such case under the Federal Rules of Civil Procedure. The two proceedings are distinct and distinctively separate" (R. 161).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

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DECEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962